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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES, INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

Appeal from the United States District Court for The Southern District of Texas, Houston Division.

MOTION TO AFFIRM ON BEHALF OF APPELLEES, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,

JOHN A. DAILY,
1225 LaSalle Street Station,
Chicago 5, Illinois

Attorney for Appellees,
The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company.

McCORMICK AND HENDERSON, INC., CHICAGO

1) That the assailed rates were not only reasonable, but were in fact, severely depressed as a result of competition. They were lower by far than similar rates in the same area.

2) That there was no showing of public interest.

3) That no evidence was adduced to justify any particular differential in the barge-rail rate.

4) That a prior rail proposal which would have resulted in a reduction of the local rate from East St. Louis to Danville, was, in fact, protested by these barge lines and subsequently cancelled.

5) That if any reduction in the barge-rail charge is necessary, it should come out of the barge factor and not out of the depressed rail factor.

All of these considerations entered into the decision and since they are supported by substantial evidence, the result should not be disturbed on judicial review. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 536; *McLean Trucking Co.* v. *United States*, 321 U. S. 67. "The accomodation of the factors entering into rate structures, including competition, is a task peculiarly for the Commission." *Alabama Great Southern Railroad Co., et al* v. *United States, et al.*, 340 U. S. 216, at p. 224.

IV.

The fourth question presented requires no reply. The lower court made an independent examination of the record and came to the same conclusions drawn by the Commission.

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CONCLUSION

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

JOHN A. DAILY,
Attorney for Appellees,
The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company.

August, 1955.

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PROOF OF SERVICE.

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, John A. Daily, attorney for certain appellees on whose behalf the foregoing Motion to Affirm is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as follows:

1. On the United States of America by mailing copies in duly addressed envelopes with air mail postage prepaid to:

   Honorable Simon E. Sobeloff
   Solicitor General of the United States
   Department of Justice
   Washington 25, D.C.

   Honorable Stanley N. Barnes
   Assistant Attorney General
   Department of Justice
   Washington 25, D.C.

   James E. Kilday, Esquire
   Albert Parker, Esquire
   Maurice A. Fitzgerald, Esquire
   Special Assistants to the Attorney General
   Department of Justice
   Washington 25, D.C.

   Malcolm R. Wilkey
   United States Attorney for the Southern District of Texas
   Room 205, Post Office Building
   Houston, Texas

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with air mail postage prepaid to:

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Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

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MOTION TO AFFIRM ON BEHALF OF APPELLEES, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,

Appellees, The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, intervened in the District Court in support of the order of the Interstate Commerce Commission, and now move

Samuel R. Howell, Esquire
Acting General Counsel
Interstate Commerce Commission
Washington 25, D.C.

Leo H. Pou, Esquire
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D.C.

3. On the Dixie Carriers, Inc., Coyle Lines, Incorporated, American Barge Line Company, and Federal Barge Line Company by mailing copies in duly addressed envelopes with postage prepaid to:

Nuel D. Belnap, Esquire
1 North LaSalle Street
Chicago, Illinois

and with air-mail postage prepaid to:

Donald Macleay, Esquire
1625 K Street, N.W.
Washington 6, D.C.

This, the 8th day of August, 1955.

JOHN A. DAILY

that the final judgment and decree of the District Court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

STATEMENT

In their "Statement Of The Case" (Statement As To Jurisdiction, pps. 6-9) the appellants have correctly stated the mechanics by which this matter proceeded through the Commission and the lower court. Certain omissions and liberties taken therein, however, require a brief statement by the appellees.

The sulphur in question does not originate at Galveston. As pointed out by the lower court, it originates at mines in the southwest, necessitating a previous rail haul from the mines to Galveston for loading into barges. The movement via plaintiffs' lines, therefore, would be rail-barge-rail. Plaintiffs, however, seek the establishment of a through route and joint rate only for the barge-rail portion beyond Galveston.

The plaintiffs do not seek judicial review of those portions of the Commission's decision dealing with reasonableness of the rail rates and the necessity or desirability of the establishment of through routes and joint rates. These questions, however, cannot so easily be divorced from the Commission's decision. The latter must be considered and reviewed as a whole. The allegation that neither the Commission nor the Court properly scrutinized the issues presented is unfounded. Such contentions may easily be refuted by examination of the Commission's final report, and are further belied by the opinion of the lower court, wherein it is stated:

"We have however, independently of the conclusions reached by the Commission, considered the Record and reached substantially the same conclusion."

The plaintiffs further contend that the evidence shows that "for their services rendered under all-rail joint rates the defendant railroads accepted as compensation a division less than their said local rate, although there was no difference *shown* between the services rendered by them on ex-barge traffic and those rendered by them on all-rail traffic." There was no difference *shown*, there was no evidence, *pro* or *con*, on the question, and properly so, since the issue was not raised in the plaintiffs' complaint before the Commission. (Appendix A)

ARGUMENT

I.

(1)

In a preamble under "Questions Presented", (Statement As To Jurisdiction, p. 3) the plaintiffs state that:

> "The matter complained of is the charging by said railroads of their East St. Louis—Danville local rail rate on ex-barge sulphur originating at Galveston . . . and delivered to them by their water carrier connections at East. St. Louis, while contemporaneously joining with connecting railroads at East St. Louis in a joint through rate from Galveston . . . out of which said railroads accept a secret, contractual division less than said local rate. . . . The services rendered . . . on the ex-barge sulphur are the same as on the through all-rail sulphur."

If this is *now* the gist of the plaintiffs' case, then it is clear that they cannot prevail, since this issue is absent from the complaint filed with the Commission upon which this entire proceeding is based. Inasmuch as the record has not yet been printed for the Court, appellees have reproduced the complaint, and it is attached hereto as Appendix A.

The facts upon which the complaint is based are set out in Paragraph III of Appendix A. They are, briefly: (1) that the defendants participate in joint rates over all-rail routes while refusing to so join with the plaintiffs in joint rates over barge-rail routes; (2) that as a result the existing charges over barge-rail routes are *excessive and unreasonable;* (3) that it is *necessary or desirable in the public interest* that through routes and joint rates thereover be established with reasonable differentials under the all-rail basis, and (4) that the refusal of the defendants

to so join is discriminatory against the plaintiffs. There is no hint of an attack on the allegedly varying charges of the rail carrier defendants beyond East St. Louis.

The statement at Paragraph V of Appendix A that "defendants are maintaining rates and charges which are discriminatory in violation of section 3(4)" refers solely to the matter set out in Paragraph III, that the defendants refuse to establish through barge-rail routes and joint rates thereover with "reasonable" differentials under the all-rail rates. The only other reference to discrimination in charges, therefore, was made in connection with a proposed all-rail reduction. This proposal, however, was subsequently cancelled and never took effect (R. p. 40).

That the plaintiffs' complaint did not and was not intended to raise the issue of local rates versus divisions was made entirely clear by counsel for the plaintiffs at the oral argument before the entire Commission in the following colloquy:

(Record, p. 112)

> Commissioner Alldredge: "Are you asking for establishment of joint through rates or simply the removal of discrimination, either that way, or through the establishment of proportional rail rates?"
>
> Mr. Belnap: "No, we are asking for joint through rates, and urge you that this is the necessary step to remove the discrimination demonstrated."
>
> Commissioner Alldredge: "If the Commission required the railroads to establish beyond East St. Louis a proportional rate."
>
> Mr. Belnap: "Equivalent to their division, that would be one method of curing the thing about which we complain but that isn't the relief we have asked. *I don't believe that is really one of the issues of our complaint* because our complaint asks for through, joint through rates to cure the discrimination."

The authorities are unanimous in that a question not raised or waived before an administrative body cannot and will not be considered on judicial review of the agency's action. *United States* v. *Baltimore & Ohio R.R. Co.*, 231 U.S. 274; *United States ex rel Coltman* v. *Bullock*, 110 F. Supp. 126.

In *Helvering, Commissioner Of Internal Revenue* v. *Tex-Penn Oil Co.*, 300 U.S. 481, this Court stated at p. 498:

> "He (the Commissioner) sought no ruling upon the question from the board or the lower court and is therefore not entitled to have it decided here. *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380."

It is thus clear that what the plaintiffs refer to as "The matter complained of" is not properly before this Court for review, and the first specific "question presented" is therefore irrelevant in this proceeding.

(2)

Assuming *arguendo* that the question was both relevant and properly presented, it is well settled that a "division" of a joint through rate is not a "rate" or "charge" within the meaning of the Interstate Commerce Act, and is not comparable with "rates, fares and charges" as such.

Divisions are, when referred to, specifically designated in the Interstate Commerce Act. Many sections of the Act refer to rates, fares and charges. Comparatively few, however, deal with divisions. It will be noted, for example, that Section 6 [63 Stat. 486, 49 U.S.C.A. 6] provides for the publication of schedules showing all "rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier." Divisions of joint rates, however, are not required to be published. *Acme Mills* v. *Director General*, 38 I.C.C. 492; *Chase & Co.* v. *N.Y.C. R.R. Co.*, 161 I.C.C. 614, 616.

Another example of the difference between divisions and "rates, fares and charges" may be found in Section 15(6) of the Act. [41 Stat. 486, 49 U.S.C.A. 15(6)]. Therein the Congress has directed that the Commission, in prescribing divisions, must take into consideration certain specific factors. Failure to follow the conditions of Section 15(6) invalidates the Commission's order. *Brimstone Railroad And Canal Company* v. *United States, et al.*, 276 U.S. 104. The Act contains no comparable provision covering "rates, fares and charges."

In its earliest decisions, the Commission has held that divisions are unlike and not comparable to "rates, fares and charges" or more specifically here, a local rate. In *Board of Trade of Troy, Ala.* v. *A.M. Ry.*, 6 I.C.C. 1, 23, the Commission stated:

> "A local rate covers the expense of two terminals, but a division of a through rate * * * can only embrace the expense of one. Because of this difference in expense, among other reasons, local rates are as a general rule much higher in proportion to the length of the haul than through rates or any division thereof."

(3)

It will be noted that the plaintiffs' question is based solely upon the ruling of this Court in *Interstate Commerce Commission* v. *Mechling*. 330 U. S. 567. The *Mechling* decision is not controlling here, and has been distinguished by the Commission and by the lower court in their separate opinions.

The *Mechling* decision dealt with the proportional rate paid by the shipper as one of the components of a combination rate which proportional was higher on ex-barge grain than on ex-rail. These were separately established and published rates. As recognized by the Commission, the latter decision did not involve the question of unpublished divisions of joint rates.

The lower court further distinguished the *Mechling* proceeding from the case at bar, noting the absence of evidence of public interest, and the lack of evidence of discrimination. The *Mechling* proceeding, moreover, did not involve the question of through routes or joint rates.

The plaintiffs themselves admit, at pps. 13-14 of the Statement as to Jurisdiction that the *Mechling* case is not actually controlling herein, but state that the question should nevertheless be settled by the Supreme Court. This, of course, refers to the issues of divisions versus local rates, previously disclaimed in this proceeding. Even were it not disclaimed, a long line of Commission and Supreme Court decisions have established that local rates are based upon considerations entirely different from those entering into divisions of joint rates, that the two are therefore wholly unlike, that a division is ordinarily less than a local rate, and that neither is a proper measure of the other.

As a rule the division of a carrier on through business is less than its local rate between the points where the division applies. *Gump* v. *B. & O. R. R.*, 14 I.C.C. 98, 105, and a division of a joint rate which a carrier accepts as its proportion is not a test of the lawfulness of its separately established rates. *Bituminous Coal to Youngstown*, 163 I.C.C. 3, 12.

This proposition has on numerous occasions found approval in the Courts. In *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, the Court stated at p. 239:

> "The mere fact that the disparity between the through and local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted unjust discrimination."

The principle was unequivocally confirmed in *Parsons* v. *Chicago & Northwestern Ry.*, 167 U. S. 447, the Court stating at p. 457:

> "That the portion of a through rate received by one of the companies parties thereto may be less than its local rate is not questioned."

The joint through tariff of two connecting railroads is therefore not a standard by which the local tariff of either can be declared in violation of the prohibition against preferences prohibited by Section 3. *Tozer* v. *United States*, 52 F. 917. The *Tozer* opinion cited with approval the case *of Chicago & Northwestern Ry. Co.* v. *Osborne*, 52 F. 912, cert. denied, 146 U. S. 354. Therein, after propounding the principle that a through tariff is not standard by which the separate tariff of either railroad may be condemned, the Court stated at p. 916:

> "Again, at the time of the passage of this act joint through tariffs were well known, as well as the fact that they were generally less than the sum of the local tariffs . . . if Congress had intended to make the local tariff subordinate to or measured by the joint tariff, its language would have been clear and specific."

If follows that the first question presented by the plaintiffs, while not properly raised, has nevertheless been previously resolved in the negative.

II.

The second question presented assumes a fact not in evidence: to wit, that the rail carrier performs the same service in each instance. As heretofore stated, there was no evidence introduced by either party on that subject. The issues presented to the Commission by the plaintiffs' complaint required none. The question thus presented to the Court, shorn of the unwarranted statement of fact, is: Is it unlawful *per se* under Section 3(4) of the Act for a rail carrier to refuse to join in through routes and joint rates with a water carrier, the rail carrier having previously established such arrangements with a connecting rail carrier? Otherwise stated, when one carrier joins

in through routes and joint rates with another, must the first carrier thereafter, as a matter of law, join in similar arrangements with all other carriers, regardless of circumstance? Secondly, in the case of barge-rail rates, must the Commission in every instance establish differentials under all-rail rates even though there is no evidence of what, if any, differential is required.

It will be noted that the question, as proposed by the plaintiffs, contains the proviso of equality of services (as to which there was no evidence). Furthermore, the third question proposed by the plaintiffs inquires as to whether certain evidentiary matters noted by the Commission are sufficient to justify a difference in treatment, thus recognizing both that there are some differences and that those differences may justify dissimilar results.

That the question of discrimination is not purely one of law but one of fact has long been recognized by this Court. *United States* v. *Louisville & Nashville Railroad Co.*, 235 U. S. 314. *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534. The question of discrimination is one upon which the finding of the Commission, supported by substantial evidence, is conclusive. It is beyond the province of the court to consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases. *Virginian Railway Co.* v. *United States*, 272 U. S. 658.

The Commission has upon many occasions held that whether through routes or joint rates shall be established depends upon such matters as public demand or necessity and whether or not the absence of joint rates is detrimental or obstructive to the public interest and the ends of justice between the parties. *Empire Steel & Iron Co.* v. *Director General*, 56 I.C.C. 158, 162. The question of whether or not

they should be established is one calling for the exercise of the Commission's judgment upon the circumstances and conditions of each particular case. *Beaver Sand Co.* v. *Director General*, 66 I.C.C. 285, 288-289.

In *Southern Pacific Company* v. *Interstate Commerce Commission*, 200 U. S. 536, the Court stated at p. 553:

> "The whole question of joint through tariff rates . . . is one of agreement between the companies, and they may, or may not, enter into it, as they think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers who, between each other, might be regarded as competing roads."

It will further be noted that the power of the Commission to establish through routes and joint rates does not stem from Section 3(4) of the Act. That power is found only in Section 15(3) of the Act and the Congress therein prescribed the requisite that such through routes and joint rates as are desired must be shown "necessary or desirable in the public interest." *Virginian Railway Company* v. *United States, et al.*, 272 U. S. 658; *Interstate Commerce Commission* v. *Columbus & Greenville Ry. Co.*, 319 U. S. 551, 555. *Thompson* v. *United States*, 343 U. S. 549.

The question whether the public interest would be so served is to be determined by the facts and circumstances of each case, including the nature of the traffic and the character of the transportation service. *Inland Navigation Co.* v. *B. G. & T. R. R.*, 281 I.C.C. 515, 534, and where the general public is adequately served and there is no apparent necessity or demand on the part of shippers for through routes and joint rates, the Commission will not require their establishment merely to enable one carrier to wrest greater compensation from its connection. *New York Dock Railway* v. *B. & O. R. R.*, 32 I.C.C. 568, 575.

Aside from the *Mechling* case, the only other proceeding cited by the plaintiffs in their behalf is the decision of the Commission in *Denver & Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, 287 I.C.C. 611. The Commission's decision therein has been the subject of judicial review in the District Court of Omaha, Nebraska, (No. 76-53. *Union Pacific Railroad Company, et al.* v. *United States of America and Interstate Commerce Commission*), and in the District Court of Colorado (No. 4492 Civil. *The Denver & Rio Grande Western Railroad Company* v. *United States of America and Interstate Commerce Commission*). The Nebraska court reversed and remanded in part. The Colorado court reversed and remanded the Commission's order in its entirety. Both decisions are now before this court on appeal, and it would therefore seem inappropriate to comment thereon. However, to rebut certain inferences drawn therefrom by the plaintiffs, a brief clarification will be made.

As admitted by the plaintiffs, the latter decision, popularly referred to as "The Ogden Gateway Case" involved other and much broader issues. It did not involve any question of divisions versus published rates, and, contrary to the plaintiffs' contention here that the Commission's order was based solely on Section 3(4) of the Act, the decision plainly states at 287 I.C.C. 611, p. 619:

> "The paramount issue . . . is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes of all traffic in connection with the Rio Grande between the areas involved . . . that issue falls within the limitations of section 15(3) and (4). In addition, evidence was presented bearing upon the issues of reasonableness . . . discrimination . . . undue prejudice. *These issues are closely related and will be considered together.*"

and in dealing with certain established routes, at p. 658:

> "There is upon this record . . . . no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under Section 3(4) of the Act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over routes alleged to be preferred. No such showing has here been made."

It is also noteworthy that in the excerpt from the Nebraska court's decision cited by plaintiffs, that court refused to disturb the Commission's "factual conclusion" of discrimination.

It must be remembered that the plaintiff's complaint does not seek solely the establishment of through barge-rail routes and joint rates, but alleges that such joint rates be prescribed with "reasonable" differentials under the all-rail basis. The Commission found that there was no evidence that any particular differential was required to remove the alleged discrimination. This finding was not appealed to the lower Court and does not appear to have been presented here. Clearly, the Commission need not prescribe a differential where none is required by the evidence, nor will this court under such circumstances reverse the Commission's order.

III.

The third question presented, contrary to the plaintiffs' theory, deserves some attention. This complaint raised issues of reasonableness, public interest and discrimination. The Commission's opinion, in justice, must be considered as a whole. The Commission found upon the entire record:

lants as connecting water carriers, in violation of Section 3(4) of the Act. The Commission was asked to require the railroads to establish and maintain such through barge-rail routes and joint through rates, with reasonable differentials under the all-rail rates as the Commission deemed reasonable, just and otherwise lawful.

Following hearings on the complaint before a Commission hearing examiner and the service of a recommended report and order, the Commission, by Division 3, issued its report and order on December 22, 1952 (one Commissioner dissenting), in which it found that the evidence did not warrant a finding that the present through barge-rail rate is unreasonable or otherwise unlawful, and that such evidence affords no basis for a finding of unlawful discrimination under Section 3(4) of the Act. 287 I.C.C. 403. Appellants' petition for reopening, reconsideration and oral argument was granted and oral argument was heard. In its report on reconsideration issued January 19, 1954, the entire Commission (291 I.C.C. 422) affirmed the findings of Division 3 (three Commissioners dissenting and one not participating). The District Court unanimously sustained the Commission's order (129 F. Supp. 28), and denied appellants' motion for a new trial, and to amend findings of fact and conclusions of law.

The appellants contend that the Commission erred in holding that divisions of joint rates are the result of contractual arrangements between car-

riers and are not "rates" or "charges" as those terms are used in Section 3(4) of the Act, and in failing to take into consideration the difference in treatment of barge and rail connections and find as a fact that such treatment was nondiscriminatory.

Appellants' contention with respect to the alleged violation of Section 3(4) is grounded upon the claim that out of the joint barge-rail rate on sulphur of $6.66 from Port Sulphur, La., to Danville, the barge lines' division is $4.40 for their haul to East St. Louis and the rail carriers' division is $2.26 for their haul from East St. Louis to Danville, while the rail carriers operating east of St. Louis receive from their connecting rail lines, reaching that point from Galveston, a division of the all-rail rate of $9.184, an amount (not revealed in the record) less than their local rate of $2.95 for the haul from East St. Louis to Danville. In other words, plaintiffs contend that the separately established rate paid by a shipper on ex-barge traffic (from Galveston) beyond East St. Louis, is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination.

ARGUMENT

In their complaint before the Commission appellants actually charged that the railroads involved have failed to establish through routes and joint rates with the water carriers in violation of Sec-

tions 1 and 307(d), and that they are maintaining rates and charges which are discriminatory against the barge lines in violation of Section 3(4). The latter section deals only with "rates, fares, and charges" insofar as pertinent here.[1] The Commission found that a division of a joint rate is not a charge within the meaning of Section 3(4). (291 I.C.C. 422, 424). It is difficult to see how the issue of discrimination here can be predicated on the provisions of that section.

Appellants rely on *I.C.C.* v. *Mechling,* 330 U.S. 567, which is distinguishable. That case is concerned only with proportional rates which were identical in nature and in the basis of their establishment, and no single factor rates were involved therein. In the instant case, the Commission points out (291 I.C.C. 422, 424): * * * * * * * * * *

> The claim here is not that the complainants are discriminated against in the matter of divisions of joint rates, as was the case in *Western Pac. R. Co.,* v. *Southern Pac. R. Co.,* 55 I.C.C. 71, referred to by the complainants, nor that the separately established rate paid by the shipper as one of the components of a combination rate is greater for the transportation of ex-barge traffic than for ex-rail traffic, which

[1] Section 3(4), in applicable part, reads as follows:

> All carriers subject to the provisions of this part * * * shall not discriminate in their rates, fares, and charges between connecting lines, * * *. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

was the situation in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, also cited by the complainants, but that the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination. The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things. Basically, divisions of joint rates are the result of contractual arrangements between carriers; they are not "rates" or "charges" as those terms are used in section 3(4) of the act. A seemingly contrary opinion expressed in *Western Pac. R. Co.* v. *Southern Pac. Co., supra,* upon which the complainants rely, was made, as above indicated, under circumstances different from those now before us, and is not controlling here. * * *

The Commission has held since the earliest days of its existence as a regulatory body that a comparison of a division of a joint rate and a local rate is not a proper test of the lawfulness of either. *Board of Trade of Troy, Ala.* v. *A.M. Railway,* 6 I,C.C. 1; *Bituminous Coal to Youngstown,* 163 I.C.C. 3, 12. The Court in *Texas & Pacific Ry.* v. *Interstate Commerce Commission,* 162 U.S. 197, approved this principle.

The distinction between local rates and divisions of joint rates is emphasized by the fact that when Congress amended Section 15 of the Act in 1940,

Appendix A

BEFORE THE
INTERSTATE COMMERCE COMMISSION

American Barge Line Company
Coyle Lines, Inc.
Dixie Carriers, Inc.
Inland Waterways Corporation
(Operating Federal Barge Lines)
Complainants,

vs.

Chicago & Eastern Illinois Railroad Company
Illinois Terminal Railroad Company
The New York Central Railroad Company
Wabash Railroad Company
Defendants.

Docket No. 30731

COMPLAINT

The complaint of the above-named complainants respectfully shows:

I.

That complainants are corporations engaged in transportation as common carriers by water of general commodities (including sulphur) under certificates of convenience and necessity issued by the Interstate Commerce Commission; that over routes authorized by their respective certificates and to the extent their respective routes traverse the waterways named below, complainants are so engaged on the Mississippi River between East St. Louis,

Illinois, and Port Sulphur, Louisiana, and on the Gulf Intracoastal Canal between New Orleans, Louisiana, and Galveston, Texas; that the transportation of sulphur by complainants from Galveston via New Orleans to East St. Louis is under circumstances and conditions which subject such transportation to Part III of the Interstate Commerce Act; and that said complainants are connecting carriers of the above-named defendants insofar as said defendants and railways connecting therewith operate to, from and via ports on the waterways just named.

II.

That the defendants above-named are common carriers by railroad engaged in interstate commerce between various states in the United States and as such defendants are subject to the provisions of the Interstate Commerce Act.

III.

That the defendants, to the extent they participate in the transportation, maintain on sulphur in carloads from Galveston, and other origins in Texas to Danville, Illinois, joint rates over through all-rail routes while contemporaneously refusing to join complainants in joint differential rates over through barge-and-rail routes from Galveston to Danville; that as a result the existing rates and charges over barge-and-rail routes from Galveston to Danville are excessive and unreasonable; that it is necessary or desirable in the public interest for the defendants and the complainants to establish such through barge-and-rail routes and joint rates thereover and to maintain in connection therewith reasonable differentials under the corresponding all-rail rates; and that said refusal of the defendants is discriminatory against complainants as connecting carriers, said discrimination being in favor of connecting carriers by railroad with whom said defendants participate in the maintenance of through all-rail routes and joint rates thereover.

IV.

That the defendants have now published a reduction in their all-rail rates from both Galveston and other Texas points and from Port Sulphur, Louisiana, to Danville, as carried in Supplement No. 57 to S. W. L. Tariff No. 102-W, Agent D. Q. Marsh's I.C.C. 3862, effective December 24, 1950, concurrently with an application for relief from the Fourth Section, S.W.F.B. B-4237; that publication of such reduction while refusing to join complainants in reasonable joint differential rates at reasonable divisions over existing through barge and rail routes from Galveston to Danville augments and aggravates the discrimination against complainants as connecting common carriers of property.

V.

That by reason of the facts stated in the foregoing paragraphs the defendants have failed and refused to establish and maintain reasonable through routes and joint rates with complainants in violation of sections 1 and 307(d) of the Interstate Commerce Act; and defendants are maintaining rates and charges which are discriminatory against complainants as connecting carriers in violation of section 3(4) thereof.

WHEREFORE, complainants pray that defendants be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said Act, and establish and put in force and apply in future to the transportation of sulphur between the origins and destinations named in paragraphs III and IV hereof such through routes and joint rates, as the Commission may deem reasonable and just and otherwise lawful, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Chicago, Illinois, December 12th, 1950.

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